RE RAJANGAM MARIMUTHU MUDALLIAR; EX P PARKASH SINGH WASAWA SINGH

HIGH COURT MALAYA, MUAR
AHMADI ASNAWI JC
[SUIT NO: 29-47-1987]
30 SEPTEMBER 2009

BANKRUPTCY: *Discharge - Discharge without settlement - Director General of Insolvency - Exercise of discretion to discharge a bankrupt - Bankrupt aged 58, judgment debt less than RM10,000 and bankruptcy been administered for more than 10 years - Whether discharge in accord with public policy - Bankruptcy Act 1967, ss. 33, 33A, 33B*

BANKRUPTCY: *Discharge - Discharge without settlement - Prohibitory order - Bankrupt aged 58, judgment debt less than RM10,000 and bankruptcy been administered for more than 10 years - Prohibitory Order against Director General of Insolvency - Whether untenable - Whether to be revoked - Bankruptcy Act 1967, ss. 33, 33A, 33B*

This case/appeal brought into focus the scope of the discretion and powers of the Director General of Insolvency ('DGI') to discharge a bankrupt under the provisions of s. 33A(1) of the Bankruptcy Act 1967 ('the Act'). The DGI, in seeking to issue the Certificate of Discharge herein ('the Certificate'), had *inter alia* factored in the facts that he had administered the bankrupt's estate for more than 10 years, that the bankrupt was then already 58 years old, that the judgment debt amounted to less than RM10,000 and that it was no longer possible to collect further contributions since the bankrupt had gone missing and was untraceable. This rationale notwithstanding, the judgment creditor ('JC') had objected, and in the event had applied to the High Court for an order to prohibit the DGI from issuing the Certificate. The application was allowed by the learned deputy registrar, and, being dissatisfied, the DGI appealed. Before the learned Judicial Commissioner, the primary issues that arose were: (i) whether the DGI had done all that was necessary to administer the estate of the bankrupt and to trace the bankrupt; and (ii) whether on the facts and in the circumstances it was no longer necessary to prolong the bankruptcy.

Held (allowing appeal; setting aside deputy registrar's order):

(1) The relevant provision of the Act for the determination of the JC's application is s. 33B (4) and (6) of the Act. In respect of sub-s. (6), the court need only to consider whether to dismiss

A the application under sub-s. 6(a) thereof or issue the prohibitory order under sub-s. 6(b). The exercise of this power by the court is however not subjected to and is independent of the tests and requirements mandated under ss. 33(3), (4), (5), (6), (7) and (10) of the Act. It is not the law to link ss. 33A and 33B with
B s. 33 of the Act as was attempted by learned counsel of the JC. Equally, the due performance of statutory duties conferred upon the DGI under the Act in the management of the bankrupt's affairs and assets, and the conduct of the bankrupt subsequent to his bankruptcy, are not primary considerations in the exercise
C of this power. (para 9)

(2) The DGI's power under s. 33A of the Act is unfettered, subject only to the rights of the creditors to object and the court's power to suspend the issuance of the Certificate (not exceeding
D two years). The DGI is also not obliged to give reasons for his decision, though it is perfectly within his discretion to do so. On the facts, the court is satisfied that the DGI has done all that he could and all that was necessary to administer the estate of the bankrupt and to trace the bankrupt. (para 10)

E **(3)** By now the bankrupt would have been about 65 years old and is more a liability than an asset. Equally by now his bankruptcy would have lasted for more than 22 years. The bankrupt's last known employment was as a security guard and he was obviously quite uneducated. Clearly, it would serve no purpose
F to further prolong his bankruptcy. (para 11)

(4) The Act was enacted not with the object of punishing the bankrupt for his failure to comply with the terms of the judgment sum and nor was the Department of Insolvency
G created to act as the JC's debt collector. In the circumstances, the court is absolutely with the DGI's averment that it was no longer necessary to retain the bankrupt as a bankrupt. The court would further adopt the sentiment expressed in *Re Ang Ah Kang* that "… adalah bertentangan dengan kepentingan awam
H sekiranya seseorang terus kekal sebagai seorang bankrupt sedangkan keadaan itu tidak memberi guna kepada sesiapa". (para 11)

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Case(s) referred to:
Re Ang Ah Kang [1994] 2 CLJ 738 HC ***(foll)***
Re Ng Lei Wat; Official Assignee v. Housing and Development Board [1996] 3 SCR 106

Legislation referred to:
Bankruptcy Act 1967, ss. 15, 16, 17, 33(3), (4), (5), (6), (7), (10), 33A(1), 33B(4), (6)
Bankruptcy Rules 1969, r. 194(B)

For the applicant - Shahruddin Osman; M/s Shahruddin Osman & Co
For the DGI - Rohaiza Abd Rahman; FC

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Ahmadi Asnawi JC:

[1] On 9 August 1987 a receiving order (R.O) and an adjudicating order (A.O) were issued against the judgment debtor (Rajangam @ Rasagam a/l Marimuthu Mudalliar, (hereinafter referred to as the "bankrupt") on account of his failure to comply with the bankruptcy notice issued by the applicant/judgment creditor (hereinafter referred to as the "applicant") and served upon him on 4 March 1987. The judgment sum, interest and cost due under the judgment obtained by the applicant on 14 April 1986 *vide* Batu Pahat Magistrate Court Summons No. 82-33-1986 was RM2,500. The amount due as on the date of R.O and A.O was a mere RM3,850.20. Consequently, the Ketua Pengarah, Jabatan Insolvensi, Malaysia (hereinafter referred to the "KP") was appointed as the receiver of the bankrupt's assets/estate.

[2] On 23 October 2002, the KP issued notice to creditors of intention to issue a Certificate of Discharge, a requirement under r. 194B of the Bankruptcy Rules 1969 (hereinafter referred to as the "Rules") to discharge the bankrupt of his bankruptcy, an exercise under s. 33A(1) of the Bankruptcy Act 1967 (hereinafter referred to as the "Act"). The said exercise was purportedly grounded upon the fact that the estate has been administrated for more than ten years; the bankrupt is now 58 years old; the judgment debt was less then RM10,000; the bankrupt could not be located anymore and the possibility of collecting further contribution from the bankrupt appears nil.

[3] The applicant objected to the issuance of the said certificate and accordingly filed his Notice of Creditors Objection under r. 194C of the same on 18 January 2003. However the applicant's objection was rejected by the KP *vide* their letter dated 27 February 2007.

[4] The applicant next proceeded to apply for an order prohibiting the KP from issuing the said certificate of discharge pursuant to s. 33B(4) of the Act. The said application is "saman dalam kamar", encl. 24. The grounds of his application were as indicated in his affidavit in support, encl. 24(A); the KP's reply in opposition is encl. 29. The applicant next filed two additional affidavits *vide* encl. 27 and 32.

[5] Enclosure 24 was heard and was allowed by the learned deputy registrar on 16 December 2008. Hence this appeal to the judge in chambers by the KP against the said decision.

[6] In support of the application, basically the applicant contended that ever since the judgment debtor was adjudged a bankrupt, the KP had failed all along to furnish him with relevant information in respect of the management of the assets of the bankrupt. The requirements under ss. 15, 16 and 17 of the Act were also not complied and observed. The bankrupt's Statement of Affairs and Financial position were also not brought to his attention and up to date he has yet to receive a single sen from the bankrupt's estate. Additionally as indicated in encl. 27 and 30, the applicant now avers that he is able to trace where the bankrupt now is and the relevant information has duly been conveyed to the KP but not acted upon by the KP.

[7] The aforesaid allegations were denied by the KP as indicated in the affidavit is reply, encl. 29. It was also submitted that the present locality of the bankrupt as deposed by the applicant is mere hearsay without concrete evidence.

[8] The relevant provision of the Act for the determination of this application is s. 33B(4) and (6). It provides as follows:

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> (4) A creditor who has furnished a notice of his objection and the grounds of his objection in accordance with subsection (2) may, within twenty-one days of being informed by the Director General of Insolvency that his objection has been

rejected, make an application to the court for an order prohibiting the Director General of Insolvency from issuing a certificate of discharge.

(5) ...

(6) On an application made under subsection (4), the court may, if it thinks it just and expedient

(a) dismiss the application;

(b) make an order that for a period not exceeding two years a certificate of discharge shall not be issued by the Director General of Insolvency.

[9] In my view, the said subsection (6) is about the conferment of discretionary powers to the court and its exercise therein. The exercise of such powers is obviously unfettered and it should be exercised in a permissive sense as the word used is "may" – see *Re Ng Lei Wat; Official Assignee v. Housing and Development Board* [1996] 3 SCR 106. The court need only to consider whether in all the circumstances of the case it is just and expedient to decide whether to dismiss the application under subsection 6(a) or issue the said prohibitory order under subsection 6(b). The exercise of such powers is not subjected to and is independent of the tests and requirements mandated under s. 33(3), (4), (5), (6), (7) and 10 of the Act. It is not the law to link ss. 33A and 33B with s. 33 of the Act as was attempted by learned counsel for the applicant. Equally the due performance of the statutory duties conferred upon the KP under the Act in the management of the bankrupt's affairs and assets and the conduct of the bankrupt subsequent to his bankruptcy are not the prime consideration in the exercise of the said powers. There are also other factors taken into account or ought to be taken into account. Hence the applicant's complaints against the conduct of the KP in enforcing the provisions of the Act upon the bankrupt which was vigorously denied by the KP and the conduct of the bankrupt and his refusal to co-operate with the KP in the affairs of his bankruptcy assumed less relevance.

[10] In this case the KP purportedly exercised his discretionary powers under s. 33A of the Act. Here the KP's powers is also unfettered subject only to the rights of the creditors to object. It is for him alone to consider the objections. He may accede or dismiss the objections. The only fetter is offered by the court's powers to

suspend the issuance of the certificate of discharge for a period not exceeding two years. In the exercise of such powers, the KP is under no obligation to give reasons for so doing. However in this case the KP gave all his reasons for wanting to discharge the bankrupt of his bankruptcy on the grounds enumerated earlier. It is perfectly within his discretion to do so and he is equally entitled to exercise his discretion to issue the certificate of discharge on those grounds for the Act is silent on the criteria to be applied in the exercise of such powers. On the facts as deposed, I am satisfied that the KP has done all that he could and all that is necessary to administer the estate of the bankrupt and to trace the bankrupt. At the end of the day at paras 16 and 17 of encl. 29 the KP stated:

> 16. Saya sesungguhnya percaya dan menyatakan bahawa pada 22.8.2002 si bankrap telah berumur 58 tahun, oleh yang demikian, beliau adalah terlalu tua untuk bekerja dan membuat apa-apa sumbangan kepada estet kebangkrapan.
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> 17. Saya selanjutnya menyatakan bahawa pentadbiran estet si bankrap telah berlangsung selama 18 tahun sejak Perintah Penerimaan dan Perintah Penghukuman pada 9.8.1987 dan tiada lagi asset untuk dihasilkan dalam kebangkrapannya. Oleh yang demikian adalah tidak perlu untuk mengekalkan beliau sebagai bankrap memandangkan tiada apa-apa lagi sumbangan yang boleh diperolehi oleh si bankrap kerana usianya yang tua.

[11] I am absolutely with him. The averments and the reasons given are most relevant and sensible and it does not obviously go against public interest or policy or against the spirit of s. 33A. By now the bankrupt would have been about 65 years old. Admittedly, at that age he is more a liability than an asset now. He was last employed as a security guard before his bankruptcy. Obviously, he was uneducated. To compare him with judges who could still work up to and beyond 65 years old as submitted by learned counsel is absolutely out of place and mischievous. Equally, by now his bankruptcy would have lasted for more than 22 years. In my view on the uncontroverted facts, it would serve no purpose whatsoever to prolong his bankruptcy any further. He could no longer contribute effectively to the estate even if the KP could now catch up with him based on the information given by the applicant. The Act was enacted not with the object of punishing him for his failure to comply with the terms of the judgment sum nor was Jabatan Insolvensi created to act as the applicant's debt collector. In all the

circumstances of the case I am in full agreement with the views expressed by his Lordship in *Re Ang Ah Kang* [1994] 2 CLJ 738 at p. 740:

> Pada pendapat saya adalah bertentangan dengan kepentingan awam sekiranya seseorang itu terus kekal sebagai seorang bankrap sedangkan keadaan itu tidak memberi guna kepada sesiapa.

[12] For all the reasons given I allowed the appeal by the Ketua Pengarah Jabatan Insolvensi Malaysia with costs.

[13] Henceforth the order of the learned deputy registrar is set aside.